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In The

Supreme Court of the United States

RAMIRO RAMOS and
JUAN RAMOS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Eleventh Circuit's application of plain-error review to ***Booker*** claims, which prevents recognition of the district court's error in applying the unconstitutional mandatory Sentencing Guidelines unless the record demonstrates that the district judge would have imposed a lower sentence under an advisory scheme, an approach rejected by the majority of other circuit courts of appeals, contravenes constitutional principles and jurisprudential policies underlying the plain error rule?

II. Whether ***North Carolina v. Pearce's*** presumption of vindictiveness applies to a district court's imposition of substantially increased sentences upon defendants who successfully appealed their original convictions and sentences, where the increase is attributable to a correction of the original Sentencing Guidelines calculation but the legal basis and evidence to support the correction were available at the original sentencing?

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals, Eleventh Circuit, is contained in the Appendix (hereinafter "App.") at pages App. 1-13. Also included in the Appendix are the Eleventh Circuit's Order denying Petitioner Ramiro Ramos' motion to file supplemental brief re: ***United States v. Booker***, 543 U.S. ___, 125 S.Ct. 738 (2005), App. 14-15, and the Eleventh Circuit's unpublished opinion resolving the Ramoses' appeal following their convictions and original sentencing. App. 16-28.

JURISDICTION

The judgment to be reviewed was entered on May 5, 2005. App. 1. Jurisdiction is conferred on this Court by Title 28, U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Jury Trial Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

Federal Rule of Criminal Procedure 52(b):

> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

Juan and Ramiro Ramos and others were charged in a four count superceding indictment with conspiracy to keep migrant workers in involuntary servitude, in violation of section 371 (count 1); extortion by threats of violence, in violation of the Hobbs Act, 18 U.S.C. §§ 1951 and 2 (count 2); use of a firearm during a crime of violence, in violation of 18 U.S.C. §§ 1924 and 2 (count 3); and harboring illegal aliens from January 1, 2000, to June 20, 2001, in violation of 8 U.S.C. § 1324 and 18 U.S.C. § 2 (count 4). App. 3, 16-17. Both defendants were found guilty of all counts by a jury. *Id.*

The district court sentenced both defendants to three concurrent 63 month terms of imprisonment on counts 1, 2, and 4. App. 3. It sentenced them to a consecutive, minimum mandatory 84-month sentence on count 3, *see* 18 U.S.C. § 924(c)(1)(A)(ii), for a total of 147 months' imprisonment. *Id.* The court derived the 63 month sentence by grouping these counts and applying the highest offense level as required by Sentencing Guidelines sections 3D1.2(c) and 3D1.3(b). App. 29. This offense, involuntary servitude, U.S.S.G. § 2H4.1(a)(1), required application of the guidelines applicable to the highest level offense committed during or in connection with this crime. U.S.S.G. § 2H4.1(b)(4)(B). The court accepted the probation officer's determination that this was extortion. App. 11. The extortion guidelines required a

base offense level of 18, *see* U.S.S.G. § 2B3.2, and an increase of 6 levels for permanent or life threatening injury. U.S.S.G. § 2B3.2(b)(4)(C). Coupled with the two offense level increase for a crime committed in connection with involuntary servitude, U.S.S.G. § 2H4.1(b)(4)(B), this resulted in a total offense level of 26. App. 29. Because the Ramoses were in Criminal History Category I, this total offense level carried a sentencing range of 63-78 months. *Id.*

In the defendants' first appeal, the Eleventh Circuit Court of Appeals rejected their claims of evidentiary and prosecutorial error. App. 3-4, 22-27. But, based on this Court's intervening decision in ***Schiedler v. National Organization for Women, Inc.***, 537 U.S. 393 (2003), holding it essential under the Hobbs Act for the prosecution to establish that the defendant actually obtained property from another party, the court vacated the defendants' convictions and sentences on counts 2 and 3 in full, and on count 1 to the extent this conspiracy relied on extortion. App. 3-4 & n.1, 19-22. The court remanded for resentencing on the remaining, valid portion of the conspiracy charged in count 1, and count 4, the harboring illegal aliens charge. App. 4, 28.

On remand, over the defendants' objections, the district court made several new findings of fact and conclusions of law. It concluded that the appropriate cross-reference under section 2H4.1, the Guideline for involuntary servitude, was to section 2L1.1, the Guideline for harboring illegal aliens, not section 2B3.2, the Guideline for extortion that the district court relied upon at the original sentencing. App. 4-5, 11. The court also found that the defendants harbored 100 or more aliens, U.S.S.G. § 2L1.1(b)(2)(C), brandished a firearm, U.S.S.G.

§ 2L1.1(b)(4)(B), were organizers or leaders of a criminal activity involving five or more participants, U.S.S.G. § 3B1.1(a), and for Ramiro, that he obstructed justice. U.S.S.G. § 3C1.1. App. 5-6, 11-12 & n.6, 29. These findings increased the adjusted offense levels for Juan and Ramiro to 37 and 39, respectively. App. 6, 29. In the applicable Criminal History Category I, these offense levels carried sentencing ranges of 210 to 262 months and 262 to 327 months, respectively. *Id.* Because these sentencing ranges exceeded the statutory maximums for the conspiracy offense charged in count 1, *see* 18 U.S.C. § 371 (maximum sentence 5 years), and the alien harboring offense charged in count 4, *see* 8 U.S.C. § 1324 (maximum sentence 10 years), the district court sentenced the defendants to the statutory maximum, 180 months – consecutive sentences of 60 months on count 1 and 120 months on count 4. App. 6-7 & n.3. *See* U.S.S.G. § 5G1.1(a) (where statutory maximum is less than minimum sentence of applicable guideline range, statutory maximum "shall be the guideline sentence").

On their second appeal to the Eleventh Circuit Court of Appeals, the defendants challenged the increases in their sentences as vindictive under ***North Carolina v. Pearce***, and challenged various Sentencing Guidelines calculations including the cross-reference under section 2H4.1(b)(4)(B) to alien harboring under 2L1.1, and the specific offense characteristics found by the district judge for alien harboring including brandishing a firearm, permanent bodily injury, and harboring more than 100 aliens. App. 7-13. Additionally, the defendants attempted to raise error in the district court's entire sentencing procedure based on this Court's intervening decision in ***United States v. Booker***, 543 U.S. ___, 125 S.Ct. 738

(2005). Pursuant to the Eleventh Circuit's procedure at that time, the court denied the defendants' motions to file supplemental briefs raising ***Booker*** errors. App. 9-10 n.6, 14-15. *See, e.g.*, ***United States v. Levy***, 379 F.3d 1241, 1242 (11th Cir. 2004), *cert. grt'd., judg. vac.*, 125 S.Ct. 2542 (2005).[1]

In its unpublished opinion, the Eleventh Circuit rejected all of the defendants' sentencing claims and affirmed. App. 1-13. The court recounted some of the trial evidence supporting the district court's findings that the May 27, 2000, assault on the mini-van driver was sufficiently connected to the illegal alien harboring charge to serve as an enhancement, that the defendants harbored more than 100 aliens, and that the mini-van driver's injury was "permanent or life-threatening" to sustain the enhancement. App. 7-9. The court concluded under its

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[1] The Eleventh Circuit Court of Appeals has just issued its decision on remand from this Court's grant of certiorari. ***United States v. Levy***, No. 01-17133, 2005 WL 1620719 (11th Cir. July 12, 2005). Not only has the Eleventh Circuit persisted in its refusal to honor this Court's directive in ***Booker*** that both its constitutional and remedial rulings be applied to all cases on direct review, ***Booker***, 125 S.Ct. at 769, but it has effectively ignored this Court's command upon granting certiorari to reconsider its decision in light of ***Booker***. *See also* ***United States v. Smith***, No. 03-15299, 2005 WL 1662128 at *2 n.2 (11th Cir. July 18, 2005) (Eleventh Circuit has already logged more than 100 remands from this Court to reconsider in light of ***Booker*** but will continue its refusal to review the alleged ***Booker*** errors on the merits). Although not the focal point of this petition, the Eleventh Circuit applied this misconceived rule creating inter-circuit conflict to the Ramoses. This petition provides a sound vehicle by which to address this rule, which conflicts with those of several other circuit courts of appeals, *see, e.g.*, ***United States v. Bruce***, No. 03-3110, 2005 WL 241254, *4, *16-17 (6th Cir. Feb. 5, 2005); ***United States v. Terry***, 240 F.3d 65, 72-73 (11th Cir. 2001), raises a question of exceptional and recurring importance. At the least, the Ramoses seek to have their sentences vacated and remanded for consideration in light of ***Booker***. *See, e.g.*, ***Levy***, 125 S.Ct. at 2547.